Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

JOHN NICKLAS, M.D.,
Petitioner,

v.

KIM EAGLE, M.D., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the "public concern" limitation of *Connick* v. *Myers*, 461 U.S. 138 (1983), under which the First Amendment does not prohibit employer retaliation against a public employee for exercise of free speech rights unless the speech involved a matter of "public concern," apply to retaliation for exercise of the right of access to the courts under the Petition Clause of that Amendment?

PARTIES TO THE PROCEEDINGS

Including the parties named in the caption of this Petition, the parties are:

Petitioner

John Nicklas, MD, an individual.

Respondents

Kim Eagle, MD, an individual; Elizabeth Nabel, MD, an individual; Robert Cody, MD, an individual; Keith Aaronson, MD, an individual.

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CITATIONS OF OPINIONS AND ORDERS

Nicklas v. *Eagle, et al.*, 1999 U.S. Dist. LEXIS 17765 (October 27, 1999). *Nicklas* v. *Eagle*, Case No. 99-2338 (6th Cir., Aug. 22, 2002)

STATEMENT OF THE BASIS FOR JURISDICTION

This is a Petition for Certiorari from a decision of the Court of Appeals for the Sixth Circuit dated August 22, 2002.

A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed on September 6, 2002, and denied on October 7, 2002.

If certiorari is granted, jurisdiction in this Court will be under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment I

STATEMENT OF THE CASE

This is an action filed on June 2, 1999 in the District Court for the Eastern District of Michigan under 42 U.S.C.

§§ 1983 and 1985,[1] jurisdiction in that Court arising under 28 U.S.C. § 1343(a). Petitioner, a tenured professor at the University of Michigan Medical School, alleged that Respondents, various of his superiors, had retaliated against him for filing a defamation suit in a Michigan state court.

The District Court dismissed the action pursuant to Fed.R.Civ.Pro. R. 12(b)(6), holding that Petitioner's suit did not involve a matter of "public concern" under the rule recognized by the Supreme Court in *Connick* v. *Myers*, 461 U.S. 138 (1983). On appeal, the Sixth Circuit affirmed.

Because the dismissal was granted under R. 12(b)(6), the controlling facts are those set forth in Petitioner's Complaint, a copy of which is included in the Appendix to this Petition.

Petitioner John Nicklas, M.D., is a cardiologist employed at the University of Michigan Medical School since 1982. He has served as Director of the University's Heart Failure and Transplantation Management Program and of its Coronary Intensive Care Unit. In the course of his work, he developed a "telemanagement system" which allows cardiologists to treat heart patients at a distance -- making more efficient use of medical personnel, allowing doctors to oversee the care of more patients, reducing the number of hospital visits, and allowing faster intervention. This system is of great commercial value.

In the fall of 1996, Respondent David Humes, M.D., induced Petitioner to join in an outside corporation to market

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[1] The claims under § 1985 were determined to be unviable and were therefore voluntarily dismissed.

this system, telling Petitioner that the corporation would generate revenues which would be used to fund his research. As soon as Petitioner had revealed the workings of the system, however, Respondent Humes gutted the corporation, leaving it a mere shell. Since then the system has been marketed without Petitioner being permitted to share in the research funds generated.

During the fall of 1997, Petitioner was informed that he was to be promoted to head of a new Disease Management Program, which would subsume the Heart Failure and Transplantation Management Program. At about the same time, he was asked to make a presentation on the telemanagement system to a group of venture capitalists. After making the presentation as requested, however, Petitioner's promotion was canceled, and various persons, including Respondents Humes and Kim Eagle, M.D., began plotting his professional downfall.

Seeing what was happening, Petitioner responded to recruiting efforts being made by Allegheny Medical Center, in Pittsburgh. Before he could go to Pittsburgh -- taking his expertise in the telemanagement system with him -- various Respondents undertook to defame him to the Allegheny personnel, which led to the loss of the new opportunity. By the end of 1997, in sum, Petitioner had been removed from his positions at the University, denied a new position, blocked from sharing in the revenues generated by the telemanagement system, and lost a substantial opportunity at another facility.

In early 1998, he filed suit in a Michigan state court for defamation in the effort which had been waged against him with respect to the Allegheny opportunity. From this time, these Respondents embarked on a broad campaign of retaliation for filing this suit. Patients were reassigned to

other doctors, without either their consent or notice to Petitioner, in direct violation of University policies. His patients have been blocked from receiving needed and indicated care, and in at least one case, a patient was enrolled in a risky experimental program without Petitioner's knowledge and without full disclosure of risks to the patient.[2] Respondents also brought a number of bogus claims of medical incompetence, to which Petitioner has not been permitted to respond. He has also been barred, for no legitimate reason, from performing state of the art procedures, forcing him to use radiation-based procedures; for safety reasons, he was compelled to wear heavy protective clothing, which gave him back problems.

Other forms of harassment and retaliation were more subtle. Petitioner was left off the hospital website and out of hospital promotional literature and out of a national research database. His supply-ordering has been interfered with. His clinics have been rumored to have been canceled, and other procedures have been deliberately misscheduled. His nursing and other staff was drastically cut back. His assistants have been interrogated about his teaching abilities -- even though they had never worked with him in instructional settings. And these are only examples.

In response, Petitioner filed suit in the District Court for the Eastern District of Michigan on <**date**> under 42 U.S.C. §§ 1983 and 1985. He asserted denials equal

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[2] The patient in question, a woman identified only as "Jane Doe," was initially denied a needed heart transplant -- a decision which, had it not been reversed, could easily have resulted in her death; Respondents' retaliatory conduct, in short, may have extended to an attempt to *murder* one of Petitioner's patients.

protection and substantive due process, as well as conspiracy. Respondents moved for dismissal pursuant to F.R.C.P. 12(b)(6), and the District Court, the Honorable Bernard A. Friedman presiding, granted their motion on October 27, 1999.

A timely appeal was taken, and on August 22, 2002, the Court of Appeals for the Sixth Circuit affirmed. The Court held that the law in the Sixth Circuit was not sufficiently established to avoid a defense of qualified immunity. The Court so held even though a previous panel had held, in a published opinion in *Gable* v. *Lewis*, 201 F.3d 769 (6th Cir. 2000), not only that the *Connick* rule did not apply to exercise of the right of access to the courts under the Petition Clause, but that the law had been sufficiently established to defeat immunity at least as early as 1995.[3]

A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on October 7, 2002.

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[3] Disregard of a prior published opinion violates 6 Cir. R. 206(c).

ARGUMENT

THE SUPREME COURT SHOULD GRANT CERTIORARI TO RESOLVE THE DISAGREEMENT AMONG THE CIRCUITS AS TO THE APPLICABILITY OF THE "PUBLIC CONCERN" RULE OF *CONNICK* v. *MYERS* TO ACTIONS ALLEGING RETALIATION FOR EXERCISE OF THE RIGHT OF ACCESS TO THE COURTS UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT.

In *Connick* v. *Myers*, 461 U.S. 138 (1983), the Supreme Court held that the First Amendment is not violated by employer retaliation for the exercise by a public employee of rights under the Free Speech Clause unless the employee's speech involved a matter of "public concern." If the speech does involve a "public concern," the value of the speech is to be balanced against the legitimate needs of the public employer under *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

Since then, the Circuits have disagreed as to whether this rule applies to retaliation for exercise of the right of access to the courts under the Petition Clause. No distinction in application of the *Connick-Pickering* rule between the Free Speech and Petition Clauses is recognized in the Second, *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049 (2d Cir. 1993), Fifth, *Rathjen* v. *Litchfield*, 878 F.2d 836 (5th Cir. 1989), Seventh, *Gray* v. *Lacke*, 885 F.2d 399 (7th Cir. 1989); *cert.den.*, 494 U.S. 1029 (1990), Eighth, *Hoffman* v. *Mayor, Councilmen, & Citizens of the City of Liberty*, 905 F.2d 229 (8th Cir. 1990), and Eleventh Circuits, *Grigley* v *City of Atlanta*, 136 F.3d 752 (11th Cir. 1998); *cert.den.*, 525

U.S. 819 (1998). The Ninth Circuit stated the same rule in *obiter dictum* in *Rendish* v. *City of Tacoma*, 123 F.3d 1216 (9th Cir. 1997); *cert.den.*, 524 U.S. 952 (1998).

The Third Circuit, however, has held that the *Connick-Pickering* rule does not apply to retaliation for exercise of rights under the Petition Clause, at least where the exercise involves a court suit or other formalized grievance mechanism provided by the state. *San Filippo* v. *Bongiovanni*, 30 F.3d 424 (3d Cir. 1994); *cert.den. sub.nom.*, *Bongiovanni* v. *San Filippo*, 513 U.S. 1110 (1995).

The Sixth Circuit, at least until the present case, which is unpublished and therefore without full precedential force, followed the rule of *San Filippo*. In *Valot* v. *Southeast Local School District Board of Education*, 107 F.3d 1220 (6th Cir. 1997); *cert.den.*, 522 U.S. 861 (1997), the three-judge panel did not reach a conclusion. Engel, J., would have held that the *Connick-Pickering* rule applied to exercise of rights under the Petition Clause; Ryan, J., would have held that the act in question, applying for unemployment compensation benefits, was not a "petition" to begin with and thus not a protected right; while Merritt, J., would have followed *San Filippo*.

The Third Circuit authority was followed, however, in *Gable* v. *Lewis*, 201 F.3d 769 (6th Cir. 2000), which involved the owner of a towing service whose relationship with the government was terminated in retaliation for her exercise of her right of access to the courts.[4] In addition, the

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[4] Although *Connick* involved an employment relationship, a number of courts have applied it by analogy to non-employment contractual relationships which bear a resemblance to employment. *White Plains Towing Corp.* v. *Patterson*, *supra* (towing service);

issues were discussed at length in *Thaddeus-X* v. *Blatter*, 175 F.3d 378 (6th Cir., 1999), where the Sixth Circuit held *en banc* that there should not be a "public concern" limitation on the right of prisoners to access the courts; this case produced various opinions, but there was no dissent on the main issue that the access right of prisoners must be protected.[5]

Petitioner submits that the rule of the Third and Sixth Circuits is preferable and ought to be adopted. Although public employers may legitimately claim an interest in preventing disruption of their workplaces by the self-interested "campaigning" of individual employees -- including by "petitions" which turn out on examination to be mere disruptive "griping" -- an employee who avails him or herself, in good faith, of a formal mechanism ordained by the government for the orderly resolution of grievances, such as a court suit, is not creating any improper disruption in the public workplace. The employee should therefore not be treated by the courts as a "troublemaker," against whom the employer ought to be able to defend itself.

Smith v. *Cleburne County Hospital*, 870 F.2d 1375 (8th Cir. 1989); *cert.den.*, 493 U.S., 847 (1989)(doctor with staff privileges at public hospital); *Copsey* v. *Swearingen*, 36 F.3d 1336 (5th Cir. 1994)(licensee under program for blind concessions in public buildings); *Havekost* v. *United States Department of the Navy*, 925 F.2d 316 (9th Cir. 1991)(licensed bagger at Navy commissary).

[5] As the Court pointed out in *Thaddeus-X*, every lawsuit requires that the plaintiff have a personal stake in the controversy, in order to have "standing," so that eliminating protection for the filing of "private" suits would have the effect of depriving the targets of retaliation of all protection for their right of access to the courts.

It has long been recognized that the right to pursue remedies in the courts is a form of "petition," and thus protected by the First Amendment. *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1962). As the Seventh Circuit stated the rule in *Vasquez* v. *Hernandez*, 60 F.3d 325 (7th Cir., 1995), *cert. den.*, 116 S.Ct. 1545, 134 L.Ed.2d 648 (1996):

> The right of individuals to pursue legal redress for claims which have a reasonable basis in law and fact is protected by the First and Fourteenth Amendments. A corollary of this right is that efforts by state actors to impede an individual's access to the courts or administrative agencies may provide the basis for a constitutional claim under 42 U.S.C. § 1983.

60 F.3d at 328 (citations omitted). Accordingly, it violates the First Amendment for a public actor to retaliate against a person for asserting rights under the former by pursuing legal remedies in court. *Haynesworth* v. *Miller*, 820 F.2d 1245 (D.C. Cir., 1987)(retaliatory prosecution for refusal to waive civil claims); *Bank of Jackson County* v. *Cherry*, 980 F.2d 1362 (11th Cir., 1993), *cert. den.*, 114 S.Ct. 73, 126 L.Ed.2d 42 (1993)(debarring bank from participation in program to pressure settlement); *North Pennsylvania Legal Services, Inc.* v. *County of Lackawanna*, 513 F.Supp. 678 (M.D. Pa., 1981) (canceling legal services contract for filing suit against county); *Westchester Legal Services, Inc.* v. *County of Westchester*, 607 F.Supp. 1379 (S.D. N.Y., 1985)(same).

The leading case applying this principle to the access right of public employees, without regard to the "public" or "private" nature of their grievances, is *San Filippo* v. *Bongiovanni*, *supra*. The Third Circuit there began by

discussing and approving the *Connick* rule as it applied to speech, and perhaps even general "petition" activities, by public employees. Where the state provides a formal mechanism for the adjustment of grievances, however -- as by waiving immunity to permit lawsuits -- it would be unreasonable to punish persons who resort to that remedy.

> The first amendment's petition clause imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances. Through its incorporation of the first amendment, the fourteenth amendment's guarantee of "liberty" imposes the same obligation on the states. *Smith* [v. *Arkansas State Highway Employees*, 441 U.S. 463 (1979),] and [*Minnesota State Board for Community Colleges* v.] *Knight*[, 465 U.S. 271 (1984),] stand only for that proposition that neither the United States nor the several states are required to recognize as a "petition" whatever particular communication is so characterized by one who chooses to protest governmental acts or omissions. But when government -- federal or state -- formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

* * *

> As applied to communication that are not petitions, The *Connick* rule means that a public employee who goes public -- e.g., by writing to the *New York Times* -- with an employment dispute that is not of "public concern" runs the risk of being disciplined by her public employer for undertaking to draw public attention to a private dispute. But when one files a "petition" one is not appealing over government's head to the general citizenry: when one files a "petition" one is addressing government and asking government to fix what, allegedly, government has broken or failed in its duty to repair.

30 F.3d at 442.

Similarly, in *Gable* v. *Lewis*, *supra*, the Sixth Circuit refused to extend the *Connick-Pickering* rule in a suit by a woman who had been removed from a towing referral list in response to her filing of sex discrimination charges.

> The question before us is whether we should read into the petition clause the "public concern" test established in *Connick v. Myers* [*supra*], a case brought by a public employee under the speech clause of the First Amendment. In *Connick* the Court said that a governmental agency may discipline or impose punishment against a public employee for speech if the sanctioned speech is a matter of "private" concern rather than "public concern." The Court made it clear that the

reason for this distinction between "private" and "public" matters is to enable government agencies, like private employers, to maintain order, discipline and civility in the workplace and to allow supervisory officials to discipline employees for offensive, insulting, or disruptive speech unrelated to expressions of opinion about policy matters. On the other hand, the Court sought to retain the right of all citizens, including public employees, to comment and express their views on matters of governmental policy. In *Connick*, the Court did not apply the "public concern" test to the petition clause, nor has it decided since *Connick* a case raising that point. Nor has the Court applied that test to citizens who are not governmental employees.

We believe that the law is clearly established that the "public concern test" does not apply to the petitioning activity in the instant case. *First*, in the *California Transport* [v. *Trucking Unlimited*, 404 U.S. 508 (1972)] case the Supreme Court included within the scope of the petition clause complaints "respecting resolution of their [petitioners'] business and economic interests . . . ." 404 U.S. at 511. Thus, the petition clause itself is not generally limited to matters of "public concern" as described in the *Connick* case but includes the petitioner's private business interests. *Second*, the reason for the "public concern" test in *Connick* -- to maintain order and avoid disruption in the governmental workplace -- does not apply in this case because plaintiff

was not a governmental employee subject to the discipline of a governmental employer. She was simply a citizen offering services to a state agency. Since the reason for the test is missing in the present case -- maintaining order in the governmental workplace -- the test should not be applied here, and the district court was correct in not including in its instructions to the jury a limitation on liability based on the *Connick* public concern test. *Third*, we find no authority in the Sixth Circuit limiting petitioning activity by public employees to matters of "public concern" either generally or in the governmental employment context. In *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220 (1997), one judge believed that the petition clause should be so limited in actions by public employees against their employers, but two other judges of the court did not agree. *See also San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1995)(holding that the "public concern" test does not apply to petitioning public employees), discussed and analyzed extensively in Shea, *San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 Vand. L. Rev. 1697 (1995), and *Thaddeus-X v. Blatter*, 175 F.3d 378, 392 (6th Cir. 1997, en banc)(holding that a prisoner's right to petition the government for redress of grievances is not subject to the public concern limitation imposed in free speech actions involving public employees). Thus there is no basis in our First Amendment jurisprudence

> for applying *Connick's* public concern test to petitioning activity by a private business woman who is simply supplying services to a governmental agency as an independent contractor.

201 F.3d at 771-772 (emphasis in original).

Accordingly, the *Connick* rule should not be extended to retaliation for exercise of the right of access to the courts by a public employee. Whatever the status of public employees who seek to recast their ordinary "speech" activities as "petitions" to their employers -- that issue is not presented in this case -- an employee who invokes a formal grievance mechanism, such as a court suit, must be protected from retaliation.

CONCLUSION

THEREFORE, Petitioner John Nicklas, MD requests of this Court that it grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-2338

[Filed October 7, 2002]

JOHN NICKLAS, M.D., Plaintiff-Appellant,

v.

KIM EAGLE, M.D., ET AL., Defendants-Appellees.

Before: NORRIS and BATCHELDER, Circuit Judges; and FORESTER*, District Judge.

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Karl S. Forester, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 99-2338

[Filed August 22, 2002]

JOHN NICKLAS, M.D., Plaintiff-Appellant,	)
v.	)
KIM EAGLE, M.D.; ELIZABETH NABEL, M.D.; DAVID HUMES, M.D.; ROBERT CODY, M.D.; KEITH AARONSON, M.D.; in their individual capacity and not in their official capacity, jointly and severally, Defendants-Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
99-72813, Morgan, 10/28/99

JUDGES:
BEFORE NORRIS and BATCHELDER, Circuit Judges; FORESTER, District Judge.*

OPINION

CORRECTED OPINION

ALICE M. BATCHELDER, Circuit Judge. Dr. John Nicklas appeals the order of the district court dismissing his claims, brought under 42 U.S.C. § 1983, alleging that the defendants, each of whom--like the plaintiff--is a medical doctor and an employee of the University of Michigan School of Medicine, denied him equal protection and substantive due process by retaliating against him for his having filed a defamation action against various medical doctors and other employees of the University of Michigan School of Medicine. The district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), holding that Nicklas had failed to state either an equal protection claim or a due process claim, and specifically holding that Nicklas's attempt to premise either an equal protection or a due process claim on a violation of the First Amendment failed because he did not claim that the defamation action involved matters of public concern. We will affirm the judgment, but we reach that result by a route somewhat different from that traveled by the district court.

In ruling on the defendants' Rule 12(b)(6) motion, the district court properly accepted the facts as pleaded in Nicklas's complaint, and we need not repeat them at any

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* The Honorable Karl S. Forester, United States District Judge, Eastern District of Kentucky, sitting by designation.

length here. Suffice it to say that Nicklas was involved in an apparently ugly dispute with various faculty members and employees of the University of Michigan School of Medicine, which resulted in his filing a defamation action against them in state court. Thereafter, Nicklas brought this action in federal court against these defendants, only one of whom was a defendant in the defamation action. Nicklas claims under 42 U.S.C. § 1983 that the defendants retaliated against him in a variety of ways for having brought the defamation action, and thereby denied him equal protection and deprived him of his liberty and property interests without due process of law; he claims under 42 U.S.C. § 1985 that the defendants conspired to deny him equal protection of the law.

The district court noted that Nicklas had not alleged that he was a member of any suspect class, and that only in his brief in response to the defendants' motion to dismiss did Nicklas first mention either free speech or the First Amendment. Overlooking that deficiency, the court concluded that Nicklas was attempting to argue that the defendants had retaliated against him for his exercising his free speech rights under the First Amendment, and that he could not state such a claim because by Nicklas's own admission, his state court defamation action did not involve matters of public concern, but related only to Nicklas's individual circumstances. Relying on *Connick v. Myers*, 461 U.S. 138, 146-47, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985), and *Rendish v. City of Tacoma*, 123 F.3d 1216, 1221 (9th Cir. 1997) ("If a public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim unless the lawsuit involves a matter of public concern."), the district court held

that Nicklas could not state a claim of denial of equal protection. Addressing the due process claim, the district court noted that Nicklas had specifically stated in his brief that he did not claim any procedural due process violation. The court concluded that the due process claim in Nicklas's complaint was premised only on state-created contract rights, and that Nicklas had not raised any due process claim premised on the First Amendment until he filed his brief opposing the defendants' motion to dismiss. Nevertheless, the court held that Nicklas could not state a claim of denial of substantive due process based on the First Amendment because his defamation action did not involve matters of public concern. The court dismissed the § 1985 claim, noting that Nicklas had conceded that he could not present any facts demonstrating class discrimination. Finally, because it concluded that Nicklas could not state a claim upon which relief could be granted, the court declined to address the defendants' claims that they were entitled to qualified immunity.

Before us, Nicklas argues--for the first time--that his defamation action was an exercise of his First Amendment right to petition for the redress of grievances, and that it is not necessary that the content of such a petition involve matters of public concern. The defendants, understandably, object to such a recharacterization of the allegations of the complaint, but counter that even thus characterized, those allegations do not state a claim of denial of either equal protection or due process, and, furthermore, the defendants are entitled to dismissal because Nicklas has not alleged--and cannot allege--facts stating any claim as to which the defendants would not be entitled to qualified immunity.

We have carefully reviewed Nicklas's complaint and the state law defamation complaint, and we conclude that Nicklas cannot prevail in this appeal. We need not tackle the question of whether actions taken in retaliation for filing a lawsuit--whether viewed as a free speech or a right to petition issue--can ever constitute a denial of equal protection, although we note in passing that torturing that claim out of the complaint before us--as Nicklas would have us do--is no small feat. Neither is it necessary for us to decide whether, viewing Nicklas's claim as one of retaliation for exercising the right to petition, his claim must be premised on a petition involving matters of public concern. Nicklas cannot prevail because both his equal protection and due process claims are entirely dependent upon his First Amendment claim, however characterized; his complaint does not allege that the matters contained in the defamation action were matters of public concern; and at the time the defendants engaged in the actions of which Nicklas now complains, it was not clearly established as a matter of law that a public employee's right to petition for redress of grievances not involving matters of public concern was protected by the First Amendment.

Nicklas filed his complaint in this action in June of 1999, complaining of activities of the defendants that occurred after he filed his defamation action in early 1998. The Supreme Court had not--and still has not--squarely addressed the issue of whether the public concern requirement is applicable to First Amendment retaliation claims brought by public employees premised on the Petition Clause. But every circuit to have squarely addressed the issue, save two, had held that the public concern requirement is applicable to First Amendment retaliation claims premised on the Petition Clause brought by public employees. *See, eg., Grigley v. City of*

Atlanta, 136 F.3d 752, 755 (11th Cir. 1998); *Rendish*, 123 F.3d at 1220; *Zorzi v. County of Putnam*, 30 F.3d 885, 896 (7th Cir. 1994); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Hoffmann v. Mayor, Councilmen and Citizens of Liberty*, 905 F.2d 229, 232-33 (8th Cir. 1990); *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989). The Third Circuit had held to the contrary in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994). And this circuit, in *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220 (6th Cir. 1997), had addressed the issue in a splintered opinion in which the author of the lead opinion adopted the majority view, *id.* at 1226 (Engel, J.); one concurring/dissenting judge opined that although there was authority for that view, such an analysis was flawed, *id.* at 1230-31 (Ryan, J.); and one concurring/dissenting judge expressed the belief that the Third Circuit's view was correct, *id.* at 1234 (Merritt, J.).

We hold that because the law was not clearly established at the time, reasonable individuals in the position of these defendants would not have known that the actions of which Nicklas now complains violated his First Amendment right to petition for redress of grievances. We further hold that nothing else in Nicklas's complaint can be construed to state a claim cognizable under 42 U.S.C. § 1983.

CONCLUSION

Accordingly, we **AFFIRM** the dismissal of the plaintiff's complaint.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil No. 99-72813

[Filed October 27, 1999]

JOHN NICKLAS, M.D., Plaintiff,

vs.

KIM EAGLE, M.D., et. al., Defendants.

JUDGES:
BERNARD A. FRIEDMAN, UNITED STATES DISTRICT JUDGE.

OPINION AND ORDER

INTRODUCTION

John Nicklas, M.D. ("Plaintiff") is a doctor and tenured faculty member at the University of Michigan School of Medicine ("U of M"). In early 1998, Plaintiff filed a defamation suit in Washtenaw County Circuit Court against certain other doctors. Plaintiff has filed the instant lawsuit

alleging that he has been retaliated against for filing the defamation suit. Plaintiff's Complaint contains three counts:

> (1) Equal protection claim under 42 U.S.C. § 1983,
> (2) Due process claim under 42 U.S.C. § 1983, and
> (3) Conspiracy to deny privileges and immunities claim under 42 U.S.C. § 1985.

FACTS

Plaintiff is a cardiologist and tenured faculty member at U of M, and has worked for the school since 1982. During his tenure at U of M, Plaintiff was responsible for developing a telemanagement treatment program (the "TTP") for treating heart failure patients over the phone. Plaintiff and another doctor formed a not-for-profit corporation that apparently was to own, and receive the revenues from the TTP. Plaintiff alleges that part of the TTP revenue was to be used for his research.

Plaintiff alleges that the not-for-profit corporation became only a "shell," and that the TTP revenues went to U of M, without any allocation to Plaintiff's research. Concurrently with the TTP dispute, Plaintiff was removed from his position as director of Heart Failure and Transplant Management Program. He was told he would become the director of a disease management program (which encompassed the former program). However, after making his first presentation to the new group, he was told he would not be appointed as director of a disease management program.

Plaintiff began looking for new employment, and had entered into preliminary discussions with Allegheny Medical

Center ["Allegheny"] in Pittsburgh. Plaintiff alleges:

> when it appeared that a substantial offer was going to be made to him [by Allegheny]...persons at [U of M] engaged in a campaign to prevent Plaintiff from making such a move; it is believed that the negative campaign was waged by one or more of the Defendants, in particular Aaronson and Eagle.

In a letter to Plaintiff from an Allegheny recruiter, Plaintiff was informed that one reason he was not hired was that "some of the young faculty have been unduly influenced by (the negative campaign) conducted by some of your detractors at Michigan." *Complaint, Exhibit C [parenthesis in original]*. However, the letter also noted that until that point, no offer was imminent, and all prior discussions were considered "preliminary".

Based on this letter, Plaintiff brought a defamation suit against various U of M doctors. In the instant case, Plaintiff alleges that as a result of bringing the defamation suit, "he has repeatedly been subject to disparate and untoward working conditions contrary to his rights to equal protection of the laws." Plaintiff also asserts a "due process" claim, as well as a "privileges and immunities" claim.

Defendants brought a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and the court held oral argument.

I. MOTION TO DISMISS -- FRCP 12(b)(6)

A motion to dismiss, or "motion on the pleadings" under Fed. R. Civ. P. 12(b)(6) requires the court to construe a complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff unquestionably can prove no set of facts in support of the claims asserted that would entitle him to relief. *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir. 1998).

In this case, even after accepting as true the facts alleged by Plaintiff, as the court must do, Plaintiff has failed to state a claim for which relief can be granted. Therefore, Defendants' Motion to Dismiss will be granted.

II. PLAINTIFF'S EQUAL PROTECTION CLAIM

As an initial matter, Plaintiff's Complaint fails to allege any facts that could, even under the most lax standard, amount to an equal protection claim. Plaintiff tries to remedy this deficiency by asserting a different argument in his Brief in Opposition to Defendants' Motion to Dismiss. However, even if Plaintiff's Brief was incorporated into his pleadings, it would not be sufficient to survive Defendants' Motion to Dismiss.

The equal protection clause of the Fourteenth Amendment is essentially a mandate that all persons similarly situated be treated alike. *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996). To state a claim under 42 U.S.C. § 1983 for a violation of the equal protection clause, a plaintiff must allege that a government action: (1) disadvantages a

"suspect class," or (2) impinges upon a "fundamental right." *Id.*

No "Suspect Class" Allegation

Nowhere in Plaintiff's pleadings or other documents submitted to the court does he allege that he is a member of a "suspect class". Therefore, Plaintiff's equal protection claim can survive only if he shows that a government action impinged upon one of his "fundamental rights".

No "Fundamental Right" Allegation

Plaintiff argues, in his Brief[1], that because he was retaliated against for filing a state court defamation suit, his fundamental free speech rights under the first amendment were violated. Plaintiff's argument lacks an essential element, however, because:

> If a public employee is retaliated against for filing a lawsuit, the public employee has no First Amendment claim **unless the lawsuit involves a matter of public concern.**

Rendish v. City of Tacoma, 123 F.3d 1216, 1221 (9th Cir. 1997).[emphasis added].

In other words, to state an equal protection claim that alleges retaliation for filing a lawsuit, the substance of the initial lawsuit must have involved a matter of public concern.

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[1] Plaintiff's Complaint does not mention either "free speech" or "First Amendment".

Id.; See also Zorzi v. County of Putnam, 30 F.3d 885, 896 (7th Cir. 1994) [same]. In the instant case, the state-court lawsuit filed by Plaintiff that allegedly has resulted in retaliation was a defamation case. To determine whether the alleged defamatory statements related to a matter of public concern, the court must examine the statements' "content, form and context...as revealed by the whole record." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985). The Supreme Court has also noted that matters of public concern are those that can be "fairly considered as relating to any matter of political, social, or other concern to the community," while matters of private concern are those that address "matters of only personal interest." *Connick v. Myers*, 461 U.S. 138, 146-47, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).

Under these guidelines, it is clear that Plaintiff's personal defamation suit is not a "matter of public concern". By Plaintiff's own admission, the defamatory statements related only to the Plaintiff's capabilities and characteristics. *Compl., Exhibit D,* P15. They did not relate to any matter of political or social concern. Therefore, the defamation suit did not involve a matter of public concern, and any retaliation for filing that suit cannot serve as the basis for Plaintiff's equal protection claim. Rendish at 1221. As noted by the Rendish court, "a private office dispute cannot be constitutionalized merely by filing a legal action." *Id.*

At oral argument, I asked Plaintiff's counsel to identify the "public concern". He responded that the public concern is the need to have access to the courts free of retaliation. This answer misses the mark. The retaliation alone is not sufficient. The case law makes clear that the substance

of the lawsuit being retaliated against must have involved a matter of public concern. *Id.* Because Plaintiff's initial lawsuit was a personal defamation suit seeking individual redress, and not a matter of public concern, the first amendment is inapplicable. Therefore, no "fundamental right" is in issue or has been impinged, and Plaintiff does not state an equal protection claim.

The Plaintiff cites *Rolf v. City of San Antonio, supra,* for the proposition that "discriminating or retaliating against a person because of his or her exercise of First Amendment rights violates equal protection." *Pl. Reply Brief, page 10.* While this statement may be true, Plaintiff's reference to *Rolf* is misplaced. As noted above, Plaintiff's "speech" – the filing of his defamation suit -- does not implicate the first amendment because it did not involve a matter of public concern. Moreover, *Rolf* is distinguishable from the instant case because the speech retaliated against in *Rolf* involved protected "political expression".

In *Rolf*, the Plaintiffs opposed the city's construction of the Applewhite Reservoir in San Antonio, Texas (the "Reservoir"). In an attempt to stop the construction, the plaintiffs purchased a 3.5 acre tract of land that was planned for inclusion in the Reservoir. The plaintiffs also made "public comments at city council meetings...and [held] rallies in opposition to [a city of San Antonio construction project]." *Rolf* at 826. Additionally, the plaintiffs collected more than 72,000 signatures of other citizens opposed to the construction. Eventually, the city succumbed to this opposition and abandoned the project.

Notwithstanding its decision to abandon the project, the city continued its condemnation proceedings against the 3.5 acre tract. The plaintiffs sued the city, alleging that its continued pursuit of the condemnation was in retaliation for plaintiff's opposition to the Reservoir construction. In reversing the lower court's dismissal, the 5th Circuit found that plaintiffs properly stated a retaliation claim based on the first amendment because the speech in issue was "political expression... in opposition to a government policy." *Id.* at 827.

Plaintiff's case is distinguishable. The speech in *Rolf*, which included the gathering of 72,000 signatures in opposition to a government project, as well as public comments and rallies, constitutes "political expression" protected by the first amendment. Therefore, the government's retaliation because of the political expression violated the first amendment. On the other hand, Plaintiff's "speech" in this case, the filing of a personal defamation suit, does not constitute "political expression," and thus is not afforded the same first amendment protection. Thus, the first amendment cannot serve as the basis for Plaintiff's equal protection claim.

The Plaintiff also cites *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987), arguing that the court found an equal protection violation when a school board retaliated against a teacher "for asserting [her] right of access to the courts." *Pl. Reply Brief at 10.* This argument, however, does not accurately describe the facts or the court's opinion. In *Kitchen*, a female high school administrator sued her employer for "intentionally discriminating against her on the basis of her sex." *Kitchen* 825 F.2d at 1008. This allegation

alone formed the basis of her equal protection claim. *Id.* Kitchen also filed a supplemental complaint to bring an unlawful retaliation claim under Title VII, 42 U.S.C. § 2000e- 3(a). *Id.* at 1008-9. Thus, Kitchen's equal protection claim was based exclusively on a government action that had disadvantaged a suspect class, and not on retaliation for exercising her first amendment rights. Clearly, *Kitchen* does not support Plaintiff's argument that the first amendment protects his right to bring a defamation suit.

In sum, the Plaintiff argues that the Defendants retaliated against him for filing a lawsuit, and that this retaliation violated his first amendment rights. However, such retaliation only violates the first amendment if the initial lawsuit involves a matter of public concern or constitutes protected speech, such as "political expression". Unfortunately for Plaintiff, his personal defamation lawsuit neither involves a public concern nor constitutes "political expression." Therefore, Plaintiff does not allege any facts upon which an equal protection claim can be based, and that claim must be dismissed.

II. PLAINTIFF'S DUE PROCESS CLAIM

Plaintiff's due process claim must also be dismissed. He has failed to plead facts that implicate the Due Process Clause. Plaintiff's Complaint does not identify which type of process he believes was violated, that is, procedural due process, or substantive due process. Plaintiff has resolved this initial matter by stating in his Brief that his is not a procedural due process case. Thus, I must only decide if he states a substantive due process claim.

The Substantive Due Process clause is not concerned with the garden variety issues of common law contract. *Sutton v. Cleveland Bd. Of Educ.*, 958 F.2d 1339, 1350 (6th Cir. 1992). Rather it protects fundamental interests "implicit in the concept of ordered liberty," such as personal choice in marriage and the family. *Id.* at 1350. State created rights, such as Plaintiff's contractual rights to promotion, tenure, research opportunities, etc., do not rise to the level of such "fundamental" interests protected by substantive due process. *Id.* at 1351.

Therefore, substantive due process does not protect the following interests which Plaintiff argues form the basis of his substantive due process claim:

(1) Interest in right as a tenured faculty member,
(2) Interest in right to engage in research,
(3) Interest in right to practice medicine,
(4) Interest in his good name and reputation,
(5) Interest in his intellectual properties and ideas.

Clearly, none of these interests rise to the level of those "implicit in the concept of ordered liberty." *See, Charles v. Baesler*, 910 F.2d 1349, 1353 ["Most, if not all, state-created contract rights...are not protected by substantive due process."] Disputes involving promotion, conditions in the workplace, changed titles, etc., are simply not the type of interests protected by substantive due process.

Recognizing that the allegations in his Complaint are insufficient, Plaintiff makes a different argument in his Brief. In his Brief, Plaintiff claims that the "fundamental" interest violated was his First Amendment right to bring suit.

Plaintiff's First Amendment theory fails for numerous reasons. First, as discussed above, Plaintiff's individual defamation lawsuit is a private matter, and not a matter of public concern. Thus, Plaintiff does not even have a First Amendment claim, let alone a derivative substantive due process claim. Moreover, Plaintiff cannot show that the Defendants deprived him of any claimed first amendment right to bring suit. In fact, he has now brought two suits.

In short, none of the interests asserted by Plaintiff in his Complaint are protected by substantive due process. Plaintiff has no First Amendment claim, and thus, no substantive due process claim can be derived therefrom. Plaintiff's substantive due process claim must be dismissed.

III. PLAINTIFF'S CONSPIRACY TO DENY PRIVILEGES & IMMUNITIES CLAIM

The Plaintiff has conceded that this claim, under 42 U.S.C. § 1985(2) cannot be sustained. Such a claim must be based on "class discrimination," and Plaintiff has not alleged any facts to that effect.

IV. QUALIFIED IMMUNITY

The Defendants argue that Plaintiff's failure to negate their qualified immunity mandates a dismissal. Since all of Plaintiff's claims must be dismissed under Fed. R. Civ. P. 12(b)(6), I will not address the qualified immunity issue.

V. CONCLUSION

All of Plaintiff's claims must be dismissed. His pleadings fail to state a claim for which relief can be granted, and his reference to the First Amendment throughout his Brief is misplaced.

Plaintiff's equal protection claim must be dismissed because he neither alleges "suspect class" discrimination, nor identifies a "fundamental right" that the Defendants have violated.

Plaintiff's substantive due process claim must be dismissed because he has not identified any interests that are protected by substantive due process.

Plaintiff concedes that his "conspiracy to deny privileges and immunities" claim cannot stand and has agreed to dismiss that claim. Therefore, for the reasons stated above,

IT IS ORDERED THAT the Defendants' Motion to Dismiss Plaintiff's Complaint is granted.

Dated: OCT 27 1999
Detroit, Michigan

/s/ _____
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE